Hon. Charles Breyer

Senior U.S. District Judge, Northern District of California

by Brian T. Fitzpatrick

Brian Fitzpatrick is the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School, where he teaches Civil Procedure, Federal Courts, and Complex Litigation.

Charles "Chuck" Breyer has lived in San Francisco almost all his life. He was born and raised there and graduated from its famous Lowell High School, the oldest public high school west of the Mississippi. He left to go to Harvard College, but returned to go to law school at the University of California at Berkeley. Even then, he had zero interest in the law. He really wanted to be an actor. He went to law school because his father was a lawyer, and, like many young men at that time, he wanted to avoid the draft for the Vietnam War.

It was not until he got a job at a small personal injury law firm that it hit him: trial lawyers are just frustrated actors! From that moment on, he approached his legal career with gusto and quickly became a leader of the bar: first at the district attorney's office where he tried more than fifty jury trials, next as a Watergate special prosecutor as deputy chief of the Plumber's Task Force, then in private practice specializing in defense of white collar offenders, and, finally, for the last 27 years, one of the most prominent federal district court judges in the United States.

Even though he has senior status now, he works incredibly hard. I know because it was very difficult to get on his schedule for the interview for this article because he was in the midst of a two-week criminal trial! But he works hard because he loves his job. In fact, he doesn't see it as a job at all. He sees it as a "wonderful opportunity to get engaged in life." Most of all, he enjoys the variety of cases. No two are alike. Every one, he says, "comes with a surprise." What has he learned in all of these years on the bench? Not to make assumptions about what he sees. He tries to reserve judgment until the end and he is not afraid to change his mind.

His brother was also a very prominent federal judge—Stephen Breyer of the U.S. Supreme Court—but there is no sibling rivalry there. He and his brother are very close; indeed, Judge Breyer is currently reading his brother's latest book.[1] True, he doesn't share his brother's famous love of French culture, but he does share the affinity for French food. He also shares his brother's famous love of the bicycle. When the weather is nice, he takes his bike on the 20-minute commute to work. When he has time off, he travels all over the world on biking excursions. His other hobbies include reading old novels—Edith Wharton is a favorite—spending time with his friends and family, and, perhaps most of all, watching the San Francisco Giants. He has season tickets, and, well, let's just put it this way: do not plan any on hearings in his courtroom during their day games.

In his 27 years on the bench, Judge Breyer has presided over 13 multidistrict litigations, more than any other judge still on the bench.[2] And he thought every single one of them presented an interesting problem. One of his favorites was MDL No. 2672, *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*,[3] where Volkswagen was caught cheating on emissions tests. The company admitted liability, and the problem for the MDL to solve was not a legal one, but a practical one: how to get all of the various government agencies going after Volkswagen on the same page so the litigation could settle. Part of his solution was to appoint an incredibly talented and incredibly prominent lawyer to the position of settlement master: former FBI director Robert Mueller III. In his estimation, only someone like Mueller would have the clout to get government officials to return calls and attend settlement discussions. The MDL was eventually resolved as perhaps the most expensive class

action settlement in American history.

Judge Breyer has not only been a prolific MDL judge, but he has also served on the panel that decides whether to create MDLs in the first place: the Judicial Panel on Multidistrict Litigation. The JPML consists of seven judges from different circuits, all appointed by the Chief Justice of the United States, and I asked Judge Breyer whether his service there was more joy or more chore. Not only was it no chore, he said, but it was one of the most popular assignments in the federal judiciary. He said it gives judges the chance to organize litigation on a national basis, not simply on the case-by-case basis that they would otherwise have in front of them. He thinks the JPML is also appealing because it is not confrontational. The transfer decisions are always resolved unanimously; no one can remember the last time there was a dissent. This is admittedly a bit peculiar, but he said he thought one reason for it is that there isn't an ideological salience to the JPML's decisions. All it decides is whether to consolidate a bunch of cases and to which judge to transfer those cases. In his experience, it was easy to reach consensus on those questions. All judges tend to see eye-to-eye on whether there are efficiencies to be gained from consolidation. And there is often an obvious judge at the "center of gravity" of the cases in question to whom to assign the rest of the cases.

I asked Judge Breyer whether, in his time there, the JPML had ever considered assigning an MDL to a panel of judges rather than to a single judge. The MDL statute allows for transfer to "a judge or judges"[4] and there are arguments that there might be diversity-of-thought benefits to assigning at least the biggest "mega" MDLs to more than one judge.[5] On this, Judge Breyer was willing to dissent. He thought MDLs would suffer from too many cooks in the kitchen when deciding the run-of-the-mill discovery questions like "how many interrogatories?," "how many depositions?," etc. Multiple judges would probably split the baby on questions like this. He thinks litigation is resolved more efficiently when these questions are resolved "resolutely and with singular purpose." But what about the legal questions that arise by motion? Preemption? *Daubert*?[6] Summary judgment for lack of evidence? Might those benefit from the diversity of a panel in "mega" MDLs? Maybe so, he said, but that is true of all sorts of important issues in all sorts of important cases, not just those that arise in MDL cases. In our system, he said, you get your panel on appeal.

It is true that it is often hard to take appeals from the decisions MDL judges make because they are interlocutory. But Judge Breyer doesn't see a need for a special rule that permits more appeals in MDL cases. Our system, he says, discourages interlocutory appeals for good reason: all the starting and stopping would drag litigation out even longer. No one should want that.

At the same time, he understands the argument that it might be unfair for one judge to get to decide so many cases in the "mega" MDLs. He said he isn't opposed to a pilot project to test out MDL assignments to multi-judge panels. But he worries about the unintended consequences. In his view, our MDL system is working pretty well, and, if it isn't broken, don't fix it.

To press this point, I asked Judge Breyer what he thought about one of the biggest complaints surrounding MDLs today: the allegedly meritless cases that they attract. He doesn't see the crisis. Meritless cases exist throughout the federal judiciary, he said, and he doesn't think mitigating them should lead to slamming courthouse doors on other litigants. Rather, he thinks meritless cases can be managed adequately with existing procedures. For example, the factually deficient cases can be identified with plaintiff fact sheets, *Lone Pine*[7] orders, and *Daubert* hearings; the legally deficient cases can be weeded out by deciding the legal issues that render them deficient.

Even so, he does support proposed Federal Rule of Civil Procedure 16.1, which would be the first Federal Rule of Civil Procedure specifically for MDL litigation. The Rule directs transferee judges to schedule an initial management conference at which a number of matters might be addressed that are often decided early on in MDLs already: leadership counsel, scheduling, discovery, what to do about future cases, etc. The Rule has been criticized both as doing nothing and as doing too much. But Judge Breyer thinks it strikes the right balance: the Rule does not tie anyone's hands, but, rather, gives judges and litigants a broad set of best practices to think about and from which they can draw. As his experience in the *Volkswagen* MDL showed, different cases demand different methods. He trusts the judges and litigants to tailor their procedures to their MDLs.

I asked Judge Breyer if he had any advice for the lawyers who practice in front of him. He does: more communication. He said most of the mistakes he has seen over the years stem from a failure to communicate with opposing counsel and the court. For example, he has frequently seen licensing agreements resolve intellectual property cases that could have headed the litigation off had the same agreements been discussed early on. Litigation is supposed to be collaborative, he says. Much like the theatrical troupe that—to our benefit—he was deprived of joining. ⊙

Endnotes

[1]Stephen Breyer, Bending the Constitution: Why I Chose Pragmatism, Not Textualism (Simon & Schuster 2024).

[2]Email with Margaret Williams of the Federal Judicial Center (as of February 2024) (on file with author).

[3]No. 3:15-md-02672-CRB (N.D.Cal.).

[4]28 U.S.C. § 1407.

[5]*See* Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 L. & Contemporary Problems 107 (2021).

[6] Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993).

[7]*Lore v. Lone Pine Corp.,* No. L33606- 85 (N.J.Super.Ct. Law Div., Monmouth Co., Jan. 1, 1986).